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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES A. GULDEN AND RICHARD SAGE,
Petitioners,

vs.

MONROE MCCORKLE, CHARLES DICKERSON AND CITY OF DALLAS
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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41

QUESTIONS PRESENTED

1. Whether the Fifth Amendment, with its guarantees against self-incrimination, requires that a public employer tender immunity when it seeks to coerce testimony from its employees under threat of job loss, and if so, when. Stated another way, does the Amendment require that an employee be advised that his compelled testimony will not be used against him in subsequent criminal proceedings and, if so, at what stage of the inquiry must the employee be so advised; and does the failure to provide such assurance justify his refusal to answer?

2. Whether, though the employer's conduct in forcing an employee to submit to questioning on penalty of job loss is ineffective to secure a legally enforceable waiver of Fifth Amendment guarantees against self-incrimination, such ineffectiveness is alone sufficient to justify the employer's failure to advise an employee that his testimony will not be used against him, or is otherwise relevant to a determination of what Fifth Amendment guarantees are to be accorded an employee.

3. Whether an *explicit* demand by a public employer for an *express* waiver of constitutional guarantees against self-incrimination provides the sole justification for an employee's refusal to give coerced testimony or to otherwise invoke the Fifth Amendment's protection.

4. Whether the court below erred in determining that the questions to be asked of petitioners were specifically, directly and narrowly related to the performance of official duties, *i.e.*, whether a municipal defendant may ask questions, on penalty of job forfeiture, which by respondents' admission do not relate to the job functions of petitioners or to the performance of official job duties.

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceedings before the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	11
Conclusion	26
Certificate of Service	26

Appendices

Appendix A	A-1
Appendix B	B-1
Appendix C	C-1

TABLE OF AUTHORITIES

Cases	Page
Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), *cert. denied sub nom.*, Rochford v. Confederation of Police, 416 U.S. 956 (1974)	13
Gardner v. Broderick, 392 U.S. 273 (1968)	12, 15, 20, 21, 24
Garrity v. New Jersey, 385 U.S. 493 (1967)	19
Lefkowitz v. Cunningham, 431 U.S. 801 (1977)	14, 15, 20
Lefkowitz v. Turley, 414 U.S. 70 (1973)	15
Uniformed Sanitation Men Ass'n v. Commissioner, 392 U.S. 280 (1968)	13, 15, 20
Uniformed Sanitation Men Ass'n v. Commissioner, 426 F.2d 619 (2d Cir. 1970), *cert. denied,* 406 U.S. 961 (1972)	14, 19, 23
United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975)	14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Charles Gulden and Richard Sage, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 21, 1982, with rehearing denied by written opinion on September 10, 1982.

OPINIONS BELOW

The initial opinion of the Court of Appeals is reported at 680 F.2d 1070, and is set forth in Appendix "A." The opinion on rehearing is reported at 685 F.2d 157, and is set forth in Appendix "B."

The opinion of the district court is set forth in Appendix "C."

JURISDICTION

The opinion of the Court of Appeals was entered on July 21, 1982. A timely petition for rehearing was denied by written opinion on September 10, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this proceeding is the Fifth Amendment of the United States Constitution, which in pertinent part provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

This action was filed by Charles Gulden, *pro se,* and Richard Sage, *pro se,* on August 21, 1978, requesting, among other things, injunctive relief against the City of Dallas, Texas, through its agents, Monroe McCorkle and George Dickerson. Petitioners sought to restrain respondents from violating their Fifth Amendment guarantees against self-incrimination by coercing petitioners to submit to lie detector tests on penalty of job loss. By order signed August 25, 1978, the district

court denied petitioners' request for temporary injunctive relief.[1]

On August 25, 1981, three years to the day that the request for temporary injunctive relief was denied, the district court issued its Findings of Fact and Conclusions of Law, denying all relief sought by Gulden and Sage. Appendix C, at 11-12. On September 2, 1981, petitioners moved for additional findings of fact, which respondents did not oppose by the filing of a response thereto. On September 28, 1981, the motion was denied. On July 21, 1982, the Fifth Circuit affirmed the district court, and by written opinion of September 10, 1982, petitioners' request for rehearing was denied.

Since 1974 and 1973, respectively, Gulden and Sage were employed by the Property Management Division of the City of Dallas' Public Works Department. At the time of their firings on August 29, 1978, both were classified as Right-of-Way Agents, whose job functions and duties consisted of negotiating the acquisition of property for use by the City (R.II, 11-12). Both were considered "outstanding" employees (R.II, 119, 143). During the material times of their employment, respondent McCorkle was the director of the Public Works Department (R.II, 8) and respondent Dickerson

---

[1] The sworn Original Complaint, which alleged "a clear violation of plaintiffs [sic] rights against self-incrimination under the 5th Ammendment [sic]" (R.I, 3), was filed eight days prior to petitioners' firings of August 29, 1978. The denial of the temporary injunction took place four days before petitioners were fired.

was his assistant for the Property Management Division (R.II, 9).

In the afternoon of August 14, 1978, a bomb threat was phoned in to the Dallas Employees Credit Union, Mockingbird Street location (R.II, 12-13). The credit union, which is not a part of the Public Works Department, is located at the opposite end of the building from public works (R.II, 13). The particular City facility involved houses numerous municipal departments with 500 or more employees throughout (R.II, 10-11). As reported to police, the threat was thought to have been made by a black male (Pxs 1, 32). Both plaintiffs are white (R.II, 17). Earlier that same day a man phoned the Lemmon Avenue branch of the credit union and had suggested to personnel there that an employee of the Mockingbird branch had been the subject of a robbery (Px 32).

During a certain time period substantially predating the time of this threat, pranks had been played on various Public Works Department employees. These pranks consisted of such things as the sending of phony valentines, turning off lights in offices, passing a fake marriage license around the office, etc. (R.II, 23-24; 117-18). Even plaintiffs were recipients of such pranks (R.II, 60-61).

According to the testimony, it was the existence of these pranks (which had apparently stopped a significant time prior to the threat) that provided the sole and only reason for McCorkle, through

Dickerson, to demand that the few employees of the Property Management Division take lie detector tests (R.II, 22), although even in McCorkle's mind there was the recognition that "a bomb threat is far more serious than a fake phone message or something like that . . . ." (R.II, 23; 61). The apparent reason for McCorkle's suspicion was that scheduled for the same afternoon as the threat was a retirement party for a former director of the Property Management Division (R.II, 24-25). The party, to which all departments in the building were invited (R.II, 25), was to occur in the cafeteria of the City facility. The cafeteria itself is located at the other end of the building from the credit union, to which the threat was made (R.II, 25). Attendance at the party was purely voluntary, and was by no means a job "duty" (R.II, 62).

On August 16, 1978, two days after the threat was made to the credit union, McCorkle presented a memo to each Property Management Division employee directing him or her to submit to a lie detector test and to sign a "waiver" in connection therewith (R.II, 27; Px 4).

Admittedly, the memo did not inform the employees of the specific questions that would be on the examination, nor were they advised how or in what fashion the information derived from the polygraphs would be used (R.II, 27-18). Attached to the memo was a "waiver" which each employee was required to execute (R.II, 14; Pxs 4, 8). Somewhat less than specific, the "waiver" provided for

particular employees to "give my consent to..... ..... to conduct this polygraph examination concerning the subject matter previously discussed" (R.I, 57; Px 8). The subject matter of the discussion was apparently the bomb threat (R.II, 15). There was no assurance that the results of the polygraph would not be used for criminal prosecution purposes (R.II, 28; Px 4). In fact, even McCorkle admitted that at the time he did not intend to limit the results to any particular or specific purpose (R.II, 15-16; 166-68). Prior to issuing the memo and tendering the waiver form, McCorkle had not discussed the matter with any employees of the division (R.II, 21). McCorkle himself agrees that the waiver he tendered to employees had an aspect of voluntariness about it, even though it was intended that the employees have no choice in the matter (R.II, 27).

On August 17, 1978, the day of the issuance to employees of the memo with the waiver, McCorkle learned that the outside polygraph firm employed to administer the exams was requiring examinees to execute an additional form, entitled "Consent to Polygraph Examination and Release of Liability" (R.II, 28-29; Px 7). This did not change McCorkle's insistence that employees submit to the test (R.II, 28), even though the second waiver, once signed, would falsely indicate that the employee "voluntarily consent[s] to this examination of my own free will, and . . . no duress, threats, or coercion have been placed upon me . . . ." but would

truly indicate that "I have not been promised . . . immunity . . . ." (R.II, 29; Px 7). After it was learned that the polygraph examiner would require this additional waiver or consent, Dickerson began passing them out to employees and telling them to sign (R. II, 104). Although petitioners had become aware of the additional document, and knew they would have to sign it, Dickerson did not tender a copy to them (R.II, 105; 141). When the plaintiffs declined to execute the waivers, they were placed on administrative leave (R.II, 106; 141; Pxs 5, 6). Interestingly, two other employees who refused to execute the waivers were not subjected to discipline (R.II, 36; 141; 155-57). Some four days later, August 21, 1978, this action was filed by Gulden and Sage without assistance of counsel (R.I, 1-6). It alleged that respondents were attempting to deprive them of their Fifth Amendment rights (*Id.*). Three days after the filing, petitioners received from McCorkle a memo, dated August 24, 1978, directing them to report to the Dallas Police Department for lie detector tests (R.II, 107; Pxs 12, 13). Nothing in the directive purported to exclude petitioners' lie detector results from use by that department for criminal investigation (R.II, 108; 147; Pxs 12, 13). Those taking the police polygraph were required to sign one of two waiver forms (Pxs 19, 24). Petitioners again refused to sign waivers and submit to polygraph examinations under these circumstances, and, by letter of August 29, 1978 (R.II, 102; Pxs 14, 15, 16), they were fired. Four days previous, the district court had denied

their request for temporary injunctive relief.

Little, if any, concern was exhibited by either McCorkle or Dickerson about the position in which petitioners were placed, namely, having been directed, on penalty of job loss, to appear at the police department and take polygraphs, the results of which were not restricted to administrative use only, and the questions for which petitioners had not been told.

> Q. The day that . . . you had their suit in hand, they have consistently maintained that they felt that that would result in a waiver of their Fifth Amendment rights?[a]
>
> A. Correct, sir.
>
> Q. Do you think that's unreasonable, Mr. Dickerson?
>
> A. Yes, sir.
>
> * * *
>
> Q. But you tell me today [,Mr. Dickerson,] that you did not know the legal effect of those instruments [that plaintiffs were told to sign]; is that correct, sir?
>
> A. That's true. I'm not an attorney . . . .
>
> Q. You'll agree that the right against self-incrimination is a very delicate and important right, would you not, sir?

[a] Plaintiffs' Exhibit 11 makes clear that Dickerson knew of the suit no later than August 22, 1978 — the day after it was filed.

A. I would say so, sir.

Q. Now, for the record, you thought it was unreasonable for these two gentlemen to assert this concern over the possibility of waiving their rights?

A. . . . I thought that idea had no merit.

* * *

Q. Now do you feel that their concern might have been a little bit legitimate?

A. Not in my opinion.

(R.II, 165-68). While the management personnel responsible for the polygraph tests were uncertain as to what self-incrimination implications would follow for the examinees, these same personnel nevertheless penalized petitioners for a similar, though genuine ignorance (R.II, 161-62).

It is clear and undisputed that the refusal to submit to polygraph examinations administered by the Dallas Police Department led to petitioners' firings. It is similarly undisputed that at no time were petitioners advised that any evidence they might give would not be used in a criminal investigation or prosecution (R.II, 28; 108; 147; Pxs 4, 5, 6, 7, 8, 12, 13, 14, 15). Nor were Gulden and Sage told the specific questions to be asked on the exams,

but only that the exams would generally concern the "bomb threat" (R.II, 27-28).[3]

During the course of these events it was apparent that there was an ongoing police department investigation of the threat. In fact, McCorkle himself spoke to a police lieutenant about it on the very afternoon the threat was made (R.II, 16). In his meeting with employees on August 17, 1978, Dickerson, too, made clear that "there is an ongoing police investigation" (R.II, 103, 107; 142). He had spoken with a police officer specifically about the petitioners (R.II, 74, 76), and the officer's report of August 22, 1978 (Px 11), refers to Gulden and Sage as "suspects." Even the independent polygraph examiner admitted to a Property Management Division employee that the City "had a couple of people in mind" (R.II, 206).

A more telling instance, however, is that the police officer by whom petitioners were to have had their polygraphs administered was sending his reports on Property Management Division employees directly to the Chief of the Dallas Police Department, not to Public Works (R.II, 201; Pxs 21, 26).

Q. Is it customary [,Mr. Dickerson,] for

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[3] The letters of discharge of August 29, 1978 (Pxs 14, 15), were the first items of correspondence wherein either McCorkle or Dickerson mentioned to petitioners that the polygraphs were for administrative use. Not even then, however, did McCorkle limit their use to that purpose only. Also, those letters provided the first mention that the questions that *would have been asked* were to be "narrowly drawn." Of course, the questions had never previously been discussed with petitioners (R.II, 27-28). They were only told they would be asked questions about the general subject of the bomb threat (Pxs 4, 5, 6, 12, 13).

> the chief of police to get involved in a purely administrative matter within a division of a department, to your knowledge?
>
> A. Not to my knowledge, no, sir.

(R.II, 78). In reality, the test results were never to be limited to administrative use (R.II, 32-33).

> Q. And then what we have is, when [the petitioners] declined to just go into the police department and talk about this bomb threat, that you admit had nothing to do with the performance of their specific duties, you fired them?
>
> A. Terminated for refusing to do what I had told them to do.

(R.II, 33).

REASONS FOR GRANTING THE WRIT

I.

It is petitioners' view that the Fifth Amendment, with its guarantees against self-incrimination, requires that a public employer tender "immunity" when it seeks to coerce testimony from an employee under threat of job loss. In other words, at the time testimony is demanded, the Amendment requires that the employee be advised that his compelled testimony will not be used against him in subsequent criminal proceedings, and the failure

to provide such assurance justifies his refusal to answer and protects him against dismissal.

To the contrary, the Fifth Circuit has now held that the Fifth Amendment does not require a public employer to advise an employee that his compelled testimony will not be used against him in subsequent criminal proceedings *before* he is required to testify under threat of job forfeiture, and in so doing has apparently adopted the decision of the trial court, that "[t]he Fifth Amendment does not require that an employee be advised that evidence obtained as a result of his testimony will not be used against him." *See* Appendix C, at 10.

By any analysis, such a holding is contrary to all existing authority. In *Gardner v. Broderick*, 392 U.S. 273 (1968), this Court, without dissent, held as follows:

> Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result *may* be self-incriminatory, and the need fully to implement its guaranty. . . . Answers may be compelled regardless of the privilege *if there is immunity* from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying . . . .

Id. at 276 (citations omitted; emphasis added).

In *Gardner* the Court further held:

> If appellant, a policeman, had refused to answer questions specifically, directly, and

> narrowly relating to the performance of his official duties, *without being required to waive his immunity* . . . the privilege against self-incrimination would not have been a bar to his dismissal.

Id. at 278 (footnote ommitted; emphasis added).

The fact that the conduct of a public employer may not have resulted in an actual waiver is obviously unimportant, for

> Petitioner could not have assumed — and certainly he was not required to assume— that he was being asked to do an idle act of no legal effect. In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment.

Id. at 279. The *Gardner* holding was reaffirmed in the companion case of *Uniformed Sanitation Men Ass'n v. Comm'r,* 392 U.S. 280 (1968). Thereafter, a series of lower court opinions construed the holdings of *Gardner* and *Sanitation Men.* In *Confederation of Police v. Conlisk,* 489 F.2d 981 (7th Cir. 1973), *cert. denied sub nom., Rochford v. Confederation of Police,* 416 U.S. 956 (1974), the Seventh Circuit, after careful analysis, stated as follows:

> In sum, then, the *Gardner* and *Uniformed Sanitation Men* decisions indicate that a public employer may discharge an em-

> ployee for refusal to answer where the employer both asks specific questions relating to the employee's official duties *and* advises the employee of the consequences of his choice, *i.e.*, that *failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings.*

489 F.2d at 894 (emphasis added). This is nothing more than what Judge Friendly had previously noted in *Uniformed Sanitation Men Ass'n v. Comm'r*, 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972), when he declared that a public employee must be "duly advised of his options and the consequences of his choice."

In *United States v. Devitt*, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975), the Seventh Circuit again was presented the opportunity to address the issue, and it aptly and succinctly summarized the rule of law imposed as a result of *Gardner*, *Sanitation Men* and *Confederation of Police*:

> [D]isciplinary action [may not] be taken against the witness for his refusal to testify, *unless he is first advised that . . . evidence obtained* as a result of his testimony *will not be used against him* in subsequent criminal proceedings.

499 F.2d at 141 (emphasis added).

Were these authorities not sufficient support for the panel, then it had the benefit of this Court's recent pronouncement in *Lefkowitz v. Cunning-*

ham, 431 U.S. 801 (1977). In an opinion by Mr. Chief Justice Burger, the Court reiterated what the Fifth Circuit has apparently overlooked, that "since the test is whether the testimony might later subject the witness to criminal prosecution, the privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution." 431 U.S. at 805.

> In either situation the witness may "refuse to answer *unless and until he is protected* at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant."

Id., quoting Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (emphasis added). After reviewing prior authority the Court stated:

> These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony *which has not been immunized.*

431 U.S. at 806 (emphasis added). Apparently "these cases" did not settle that issue for the lower courts, though even in his dissent in *Cunningham,* on other grounds, Mr. Justice Stevens acknowledged the obvious:

> The *failure to tender immunity was the critical missing element which invalidated the discharges* of the policeman and the sanitation men in *Gardner v. Broderick* . . . and in *Sanitation Men v. Comm'r* . . . .

431 U.S. at 814 n.12 (emphasis added). The Fifth Circuit discounted Mr. Justice Stevens' assessment with the astounding remark that "a 'tender of immunity' . . . has never been an explicit or implicit condition of the relevant holdings." Appendix A, at 13 n.10.

The decision of the Fifth Circuit stands at odds with all prior authority, and it heralds an era where indiscriminate use of public employee interrogation may be utilized to aid in criminal prosecutions. The requirement that one be advised that his testimony will not be used against him is no mere accident of the law. Simply put, the requirement is necessitated by the fact that in the civil context there is no absolute right to silence that may be invoked without impairing the (employment) status of the one invoking the right.

The district and circuit courts have refused to see this basic distinction, to such an extreme that they apparently concur that an employee need only be advised that his testimony *will* be used against him. *See* Apprendices C, at 10-11; A, at 8. This is, of course, the rule in criminal, not civil proceedings. Application of such a notion to the civil setting renders the holdings of *Lefkowitz, Gardner* and *Sanitation Men* absolutely meaningless. One cannot conceive of a situation where a public employer advises an employee that what he says *will* be used against him and at the same time tenders immunity.

The requirement of a tender of immunity, which

the panel implies may not exist, is so clear that on appeal respondents did not urge the contrary! The rule required by precedent, far from allowing an employee "to circumvent an investigatory proceeding," Appendix A, at 15, is one designed to protect Fifth Amendment guarantees. With all deference to the panel, once an employee is assured that his testimony will not be used against him, there is no way to circumvent an investigatory proceeding short of job forfeiture.

On rehearing the Fifth Circuit made a feeble attempt to retreat from its holding. It did so by saying that while a public employer *may* in some circumstances and "at some point" be required to advise an employee that his compelled testimony cannot be used against him in a criminal prosecution, the facts before the court "do not indicate even the existence of a particularized, specific inquiry in which questions of immunity could be properly framed." Appendix B, at 2. In other words, said the court, "the inquiry had not advanced to a level of specificity in which the competing concerns of immunity could be properly addressed . . . ." Appendix B, at 3.

With appropriate respect, to argue that the inquiry about the bomb threat had not advanced to a level of specificity so as to require respondents to address the immunity issue is to ignore reality. Here was a situation involving a bomb threat, about which petitioners, determined by the police to be "suspects," had been ordered to the police

department to provide answers which were forwarded to the Chief of Police, not to the Department of Public Works.

To ignore the reality of such circumstances and the genuine Fifth Amendment concerns they generated clearly evidences the desire of the Fifth Circuit to reach a wanted result, and then reason in reverse to support it. What the Fifth Circuit would apparently require is that each question be asked, the employee refuse to answer, then immunity be tendered. Neither *Gardner* nor its progeny envision such a mechanistic application of the principles they establish.

A public employee must be advised of his options and the consequences of his choice at the time he is ordered to testify. Any other result fails to insure that the employee's choice is meaningful, and the only "benefit" of failing to so advise at the time the demand is made is to allow an employer to coerce a forfeiture of the employee's job.

In light of the panel opinions, the Hobson's choice now is *not* compelled answers in combination with a compelled waiver of immunity, Appendix A, at 10; the choice is between absolute coerced submission to questioning without assurance that the evidence obtained will not be used to prosecute, on the one hand, and loss of employment, on the other.[4]

[4] It is imperative that one understand what the district court held and what the Fifth Circuit affirmed. The trial court—directly contrary to all precedent—held that "[t]he Fifth Amendment does not require that an employee be advised that evidence obtained as a result of his testimony will not be used against him." Appendix C, at 10. The Fifth Circuit clearly affirmed this erroneous holding. Appendix A, at 8.

The Fifth Circuit must be overturned.

II.

Closely akin to the issue set forth above is that now presented. Petitioners, with this Court in agreement, contend that even though no legally effective waiver of Fifth Amendment guarantees against self-incrimination would have resulted from compliance with respondents' demands, this fact is of no significance. This ineffectiveness, in other words, will not in and of itself justify an employer's failure to advise an employee "of his options and the consequences of his choice." *Uniformed Sanitation Men Ass'n v. Comm'r*, 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

The lower courts clearly held a contrary opinion, agreeing with the district court that the holding of *Garrity v. New Jersey*, 385 U.S. 493 (1967), prohibiting the use of compelled testimony in a later criminal prosecution, serves as an adequate safeguard. Appendices A, at 13; C, at 11. In the final analysis, "[a]ny answers given by [Gulden and Sage] could not, under *Garrity*, be used against them." Appendix A, at 15.

The fact that petitioners could subsequently renew their constitutional objections if testimony was used against them *does not* eliminate the need for employer compliance with Fifth Amendment mandates in the first instance where, as here, the compulsion is initiated in a prior, allegedly administrative inquiry. Nevertheless, the present issue

has been authoritatively answered contrary to the holding of the panel and the district court.

> [T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, *regardless of its ultimate effectiveness,* to coerce a a waiver of the immunity it confers on penalty of the loss of employment.

Gardner v. Broderick, 392 U.S. 273, 279 (1968) (emphasis added); *accord, Uniformed Sanitation Men Ass'n v. Comm'r,* 392 U.S. 280, 284 n.15 (1968) (later ineffectiveness of waiver does not eliminate the need to safeguard Fifth Amendment guarantees). In practical effect, what the panel has held is that given the protection afforded in *subsequent criminal proceedings* by virtue of *Garrity,* few, if any, self-incrimination safeguards need be enforced or recognized in previous, purportedly *civil investigative proceedings.* Particularly is this apparent when viewed in light of the panel's holding that a public employer need not advise an employee that testimony elicited from him will not be used against him in circumstances presented here. The net result is to afford the employee no Fifth Amendment self-incrimination protections when his testimony is demanded—clearly a result contrary to all precedent. Too, should the panel be correct, *Gardner, Sanitation Men* and their progeny, including *Lefkowitz v. Cunningham* (which has reaffirmed the

proposition that the ineffectiveness of a waiver is not controlling) are rendered meaningless.[8]

The panel opinion must be reversed.

III.

In addition to the previous erroneous holdings, the panel clearly appears to hold that one may properly invoke Fifth Amendment guarantees against self-incrimination and decline to answer questions without fear of job loss only when the employer makes an *explicit* demand for a waiver, or *expressly* requires a relinquishment of Fifth Amendment protections. *See* Appendix A, at 11-14.

Petitioners are aware of no authority for the proposition that one's Fifth Amendment protections become operative only in the event that an employer *expressly* or *explicitly* demands a relinquishment of those protections. To the contrary, the repeated failure to tender immunity can and should be construed by an employee as an attempt by his employer to gain not only an administrative accounting of his public trust (which is permissible under certain circumstances), but also as an attempt to gain information which can be used to prosecute him criminally. *See Gardner v. Broderick, supra,* 392 U.S. at 279. To paraphrase *Gardner,* if the former had been the only purpose of the demand for testimony, there would have been no reason for

[8] Again it is important to understand the holding of the district court, namely, that petitioners' "constitutional rights would have been adequately protected by [the] holding in Garrity . . . ." Appendix C, at 11. The Fifth Circuit clearly affirmed this irrelevant proposition. Appendix A, at 13-15.

failing to advise the employee that his testimony would not be used against him in criminal proceedings. *Id.*

The repeated failure to advise Gulden and Sage of the consequences of their actions is but one element that supports the view that the testimony sought might be used to prosecute them criminally. More important is the fact that throughout the events leading to termination there was an ongoing police investigation, in which petitioners had been fingered as "suspects" (Px 11), apparently by the persons who demanded they take polygraphs (*Id.*). If there was any doubt about the use of testimony for criminal prosecution, it was erased when petitioners were ordered to the Dallas Police Department for questioning concerning the bomb threat, with the results of the questioning reported *not* to the Public Works Department but to the Chief of Police (R.II, 201; Pxs 21, 26). Finally, at no time *prior* to their terminations were petitioners informed that the testimony was required to seek an accounting of their official duties as opposed to being used for criminal prosecutions. Even at trial some years later the person ordering the polygraph examinations acknowledged that use of the results was not confined to administrative use (R.II, 28, 32-33, 78; Px 4). In truth, what was taking place was an unbridled witch-hunt, which the lower courts have now found permissible.

These events point to the indisputable conclusion, ignored by the panel, that coercion of a waiver

(actual or "purported," *Gardner, supra,* 392 U.S. at 279) of Fifth Amendment guarantees (regardless of the effectiveness) may be accomplished not only by words but also by deeds; the demand may be implicit as well as explicit.

The panel opinion must be reversed.[a]

IV.

The trial court also concluded that the questions to be asked of petitioners were "specifically, directly and narrowly [related] to the performance of their public duties . . ." (R.I., 87; Appendix C, at 11), in accordance with *Gardner* and *Sanitation Men, supra.* Such holding was affirmed by the Fifth Circuit. Appendix A, at 16-17.

It is petitioners' view that polygraph questions which relate to a bomb threat made to another department of the City for the alleged purpose of disrupting a voluntary retirement party at which attendance is not mandatory, as a matter of law are not specifically, directly and narrowly related to the performance of petitioners' official duties as Right-of-Way Agents. Particularly is this the case

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[a] Petitioners disagree with the panel's assertion that "[t]he facts before us, do not indicate even the existence of a particularized, specific inquiry in which questions of immunity could be properly framed." Appendix A, at 14-15 (footnote omitted). How the inquiry (being ordered to report to the police department for questioning about a specific bomb threat then under investigation by the police) could be any more specific, petitioners are unaware. This language also reveals the unfortunate fact that the panel believed that the tender of immunity in civil investigations must somehow bear the formal trappings of immunity grants in criminal proceedings. The "tender of immunity" in proceedings such as are in question here, however, is but the equivalent of advising the employee of his options and the consequences of his choice. *See Uniformed Sanitation Men Ass'n v. Comm'r,* 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied,* 406 U.S. 961 (1972).

when an employee is not advised what the questions will consist of.

It is true that if one is advised that the testimony he gives will not be used against him, and of the consequences of his refusal "to answer questions specifically, directly, and narrowly relating to the performance of his official duties," he may be subjected to discharge. *Gardner v. Broderick, supra,* 392 U.S. at 277. The fact that the questions in the present case (which petitioners never saw) did not meet this exacting standard is illustrated by respondent McCorkle himself:

> Q. . . . What did the bomb threat have to do in the performance of official job duties?
>
> A. None whatsoever as far as I'm concerned.

(R.II, 20). No other conclusion could be reached in light of the fact that attendance at the retirement party was not an official job duty, not to mention that any questioning concerning the event would hardly be "directly" related to job duties. To put it another way, to what official job "duty" were the questions "specifically", "narrowly" *and* "directly" related? The best argument McCorkle could muster by trial time was that the threat was somehow related to employee "morale," which in turn was related to general job performance (R.II, 19). This is wholly inconsistent with the statement quoted above made in February, 1979 (R.II, 20). When confronted with his previous statement,

however, McCorkle did not disavow it (R.II, 20-21). And if that did not make it clear, McCorkle re-emphasized what was apparent to all:

> Q. We already know that this investigation didn't concern the performance of their official duties as Right-of-Way Agents, correct? You have previously testified to that, have you not?
>
> A. Right.

(R.II, 32). Nevertheless, if McCorkle's testimony was insufficient to establish that fact, then respondent Dickerson's surely was not (R.II, 68). Petitioners, in the first instance, are not only unable to draw a connection between the official job duty defendants sought to investigate in this cause and the questions defendants proposed to ask, but they are also at a loss to understand what job duty, if any, is involved.[7]

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[7] In Findings of Fact 19, 20 and 26, (Appendix C, at 6, 8) the court failed to employ the test established by this Court regarding the need for relation between the questions asked and the employee's "official duties." First, the district court neglected to employ the language official duties"; instead, the court saw the issue to be whether the questions were merely "job-related" (R.I. 84, Finding of Fact No. 20). In Finding No. 26, the court preferred to utilize a relationship between the questioning and "their duties." Petitioners contend that the repeated use of the word "official" by this Court is not mere surplusage.

Moreover, Fact Finding 19 makes clear that the trial court felt the relationship must be between the questions to be asked and the incident involved—the bomb threat. This is an obvious misapplication of the proper standard, and one which the Fifth Circuit adopted. The cases make clear that the relationship must exist between the questioning and the official duties—not between the questioning and the general incident (e.g., a "bomb threat," "fraud," "extortion," "murder," etc.) giving rise to the demand for a polygraph.

In Conclusion of Law No. 2 (Appendix C, at 9-11), the court again employs the "job-relatedness" test, and in Conclusion No. 4 Appendix C, at 11) the court speaks in terms of "public" duties rather than "official duties." The Fifth Circuit upheld these determinations. Appendix A, at 16-17.

CONCLUSION

The Fifth Circuit has charted a course far distant from that established by authoritative Supreme Court precedent. For the reasons set forth above, a writ of certiorari should issue to review the opinions of the Court below.

Respectfully submitted,

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Kenneth H. Molberg

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was forwarded to attorney for respondents, Joseph G. Werner, on the 6th day of December, 1982.

Kenneth H. Molberg

APPENDIX A

Charles A. GULDEN and Richard R. Sage, Plaintiffs-Appellants,

v.

Monroe McCORKLE, and George Dickerson, Defendants-Appellees.

No. 81-1518.

United States Court of Appeals,
Fifth Circuit

July 21, 1982

Public employees, who were discharged after they refused to submit to polygraph examinations, brought suit against their employer seeking reinstatement and damages. The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered judgment in favor of the employer, and the employees appealed. The Court of Appeals, Randall, Circuit Judge, held that the employees were not entitled to an affirmative tender of immunity before they could be required to submit to a polygraph examination requested by their employer for the purpose of inquiring about their knowledge of a bomb threat received by the employer.

Affirmed.

GULDEN v. McCORKLE
Cite as 680 F.2d 1070 (1982)

Kenneth H. Molberg, Dallas, Tex., for plaintiffs-appellants.

Joseph G. Werner, Asst. City Atty., Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

Plaintiffs-Appellants Charles Gulden and Richard Sage appeal from an adverse decision of the trial court in their suit against Defendants-Appellees Monroe McCorkle, Director of the Dallas Public Works Department (the "Department"), George Dickerson, Assistant Director, and the City of Dallas, Texas (hereinafter collectively the "Defendants"). Sage and Gulden were discharged[1] as employees of the Department after they refused to submit to polygraph exams requested by their Department superiors. They sued for reinstatement to their jobs and for damages. Gulden and Sage asserted that because the Defendants had failed to tender them immunity in regard to use of their polygraph answers in subsequent criminal

[1] Sage's discharge was ultimately reduced to a thirty day suspension by the City of Dallas Trial Board. Gulden's discharge was, according to the record, not modified.

proceedings, the Defendants had implicitly required them to waive such immunity in contravention of the fifth amendment right against self-incrimination. They alleged that they were then justified in refusing to take the polygraph exams and could not be discharged for so doing. We find that the Defendants did not require Gulden and Sage to waive, surrender or forfeit any protected fifth amendment rights, that, at all times, the relevant fifth amendment protections were available to Gulden and Sage and that they were therefore not protected from discharges premised on their refusals to submit to the exams. We affirm the judgment of the district court.

I. Facts and Proceedings Below

Gulden and Sage were employees of the Property Management Division of the Department. On the afternoon of August 14, 1978, the Dallas Employees Credit Union, another office located in the same building as the Department, received a bomb-threat. The bomb-threat forced the evacuation of the building and disrupted a retirement party for a Department employee. The bomb threat followed a series of pranks which had been played on various Property Management Division employees.

On August 16, 1978, two days after the bomb threat, McCorkle presented a memorandum to each Department employee directing him or her to submit to a polygraph examination and to sign a

"waiver"[2] in connection with the exam. The stated purpose of the exam according to the memorandum which accompanied the waiver was to inquire about the employee's knowledge of the bomb threat.

On August 17, 1978, McCorkle learned that the private polygraph firm administering the exams required a second waiver.[3] Dickerson distributed these forms to the employees. Gulden and Sage refused to sign either of the waivers or to take the polygraph exams. Their written reasons for refusing to submit to the exams included their beliefs that the exams "smacked of selective discrimination" and that the Defendants had no right to require such exams. Gulden and Sage were subsequently placed on administrative leave.

On August 21, 1978, Gulden and Sage filed a complaint for temporary and permanent injunctive relief against threatened discharges, for monetary damages and for reinstatement (for jobs not yet lost). They claimed that:

> Defendants attempt to force plaintiffs to

---

[2] The Department waiver stated:
I, ... of sound mind and body, age ....., do hereby submit to a polygraph examination given by ....., a certified polygraph examiner in the State of Texas. I understand that I have been ordered to take a polygraph examination by the Director of Public Works in conducting an administrative investigation for possible City of Dallas Code of Conduct violations. I hereby give my consent to ..... to conduct this polygraph examination concerning the subject matter previously discussed.

[3] The polygraph firm's waiver stated:
I, ..., hereby consent and voluntarily agree to allow Baker-Holden-McElroy & Associates to administer a polygraph (lie detection) examination to me. I voluntarily consent to this examination of my own free will, and state that no duress, threats, or coercion have been placed on me to take this examination. I have not been promised anything of value, reward, or immunity to induce me to consent to this examination. I understand that I have the right to stop my polygraph examination at any time I desire.

submit to polygraph examination[s] against their will while signing a waiver falsely stating that said submission was done voluntarily is a clear violation of plaintiffs rights against self incrimination under the 5th Amendment to the U.S. Constitution and the Texas Constitution and violates their right to due process under the 14th Amendment.

The Defendants responded:

In the instant case, the City of Dallas has sought to compel the testimony of employees about acts of harassment and retaliation directed against their supervisors. *No waiver of the self-incrimination privilege has been demanded.* (Emphasis added.)

On August 24, 1978, McCorkle ordered Gulden and Sage to report to the Dallas Police Department for polygraph exams. They were required to sign one of two waivers.[4] Gulden and Sage again refused to sign either of the two forms or to report to take the exams.

The district court, on August 28, 1978, denied the request for temporary relief stating:

Plaintiffs have not supplied the Court with

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[4] The two alternative waivers used by the police department stated:

I, ..., of sound mind and body, age ....., do hereby submit to a polygraph examination given by ....., a certified polygraph examiner in the State of Texas. I understand that I have been ordered to take a polygraph examination by the Director of Public Works in conducting an administrative investigation for possible City of Dallas Code of Conduct violations. I hereby give my consent to ..... to conduct this ploygraph examination concerning the subject matter previously discussed.

I, ... have been ordered by the Director of Public Works, ..., as part of an internal administrative investigation to submit to a polygraph examination. I agree to cooperate in the administering of this examination by members of the Dallas Police Department Polygraph Unit.

enough information at this time concerning their charges of harrassment to justify imposing a temporary restraining order. I also find that the constitution does not prohibit the City of Dallas from requiring the Plaintiffs' participation in a polygraph examination. While the city asserts that it will ask narrow and specific questions of the Plaintiffs at the polygraph examination, I cannot at this time prejudge whether or not the questions are permissible under *Gardner* or whether Plaintiffs may validly assert their privilege against self-incrimination at the polygraph examination.

On August 29, 1978, Gulden and Sage were discharged by the Defendants.

Gulden and Sage continued the prosecution of their lawsuit, requesting reinstatement and damages. They asserted that they were "discharged for exercising their protected right to refuse to answer questions and to take polygraph tests under circumstances amounting to a denial of their civil rights as guaranteed by the Fifth and Fourteenth Amendments. . . ." They also asserted that the questions to be asked were not related to their "official duties" and that they could not be discharged for refusing to answer these impermissible questions.

A bench trial was held. The district court issued findings of fact and conclusions of law, entering judgment in favor of the Defendants. The court, in its finding of fact, stated that the questions to be asked on the exams were sufficiently "job re-

lated." Furthermore, according to the court:

> There was no evidence that the Defendants demanded that Plaintiffs expressly waive their rights to invoke the Fifth Amendment's right to be free from self-incrimination and thereby relinquish the right to exclude from evidence in any subsequent criminal proceeding any statements which they might have made during the polygraph examination. There is no state statute, city ordinance or city personnel rule that purports to create any such waiver.
>
> The acts of the Defendants did not condition Plaintiffs' continued employment upon the relinquishment of their right to exclude their own testimony from evidence in a criminal proceeding and did not in any way deprive the Plaintiffs of their Fifth Amendment privilege against self-incrimination.
>
> Plaintiffs were discharged because of their refusal to answer questions specifically, directly and narrowly relating to the performance of their duties.

In its conclusions of law the court stated:

> In the case at bar, the questions asked on the polygraph exam were purely job-related. Moreover, the waivers at issue can in no way be construed as requiring Plaintiffs to relinquish their constitutional right against self-incrimination. The waivers speak merely to the fact that the examinee has consented to take the exam. The Public Works Department waiver specifically recites that the examinee is being ordered to take the examination, and the waiver required by the firm conducting the

polygraph specifically gives an examinee the right to discontinue the exam at any time.

> The Fifth Amendment does not require that an employee be advised that evidence obtained as a result of his testimony will not be used against him. It requires only that an employee be advised if it *will* be used against him, and further that an employee may not be dismissed for refusing to waive his right against self-incrimination. Had the Plaintiffs in this action submitted to the polygraph, and had there been an attempt to use that testimony against them in a criminal proceeding, Plaintiffs' constitutional rights would have been adequately protected by [the] holding in Garrity, supra, that testimony compelled by the threat of dismissal may not be used against them in a subsequent criminal action.

Gulden and Sage appeal, claiming not that they were asked to sign waivers, on penalty of job loss, which called for a surrender of their fifth amendment rights, but that the Defendants failed to make an affirmative tender of immunity to them, thus assuring them that their compelled answers could not be used in subsequent criminal proceedings against them. Gulden and Sage assert that this affirmative tender is required by controlling Supreme Court decisions, that, in the absence of such tender, their right to be free from self-incrimination was in jeopardy, and that they were justified in refusing to take the exams and could not be dis-

charged for so doing.[8] They also challenged the court's finding that the questions were specifically, directly and narrowly related to the performance of their official duties. We address each argument in turn.

II. Fifth Amendment Concerns

[1-3] We begin our review with a brief summary of th relevant Supreme Court decisions which provide guidance for our decision today. When public employees are "compelled to testify by the threat that otherwise (they) [will] be removed from office, the testimony that [they give can] not be used against [them] in a subsequent prosecution." *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Furthermore, in a series of four decisions, the Court has held that a public employee cannot be compelled to answer questions concerning his or her official duties and also be compelled by threat of loss of job to waive the immunity guaranteed in *Garrity. Lefkowitz v. Cunningham,* 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed. 2d 1 (1977) (*"Lefkowitz II"*); *Lefkowitz v. Turley,* 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) (*"Lefkowitz I"*); *Gardner v. Broderick,* 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner*

[8] Gulden and Sage do not claim (nor could they under *Lefkowitz I* and *II, Gardner* and *Sanitation Men*) that they are protected by the fifth amendment from having to *answer* questions, under penalty of job loss, when immunity from subsequent use in criminal prosecution has not been denied. Their contention seems to be rather that immunity must be affirmatively tendered in order for there to have been no impermissible demand of a waiver of immunity.

of Sanitation of the City of New York, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968) (*"Sanitation Men"*).* Public employees may, however, be required to answer *even potentially incriminating* questions "if they have not been required to surrender their constitutional immunity." *Lefkowitz II,* 431 U.S. at 806, 97 S.Ct. at 2136; *Gardner v. Broderick,* 392 U.S. at 278, 88 S.Ct. at 1916. Refusal to answer questions where there has been no requested surrender of protected rights is a ground for dismissal. *Id.*

As the Court summarized in *Sanitation Men*:

> As we stated in *Gardner v. Broderick, supra,* if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment *without requiring relinquishment of the benefits of the constitutional privilege,* and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake.

392 U.S. at 284, 88 S.Ct. at 1920 (emphasis added). In summary, as these cases emphasize, it is the compelled answer *in combination with* the compelled waiver of immunity that creates the Hobson's choice for the employee. It is a discharge pre-

* In *Lefkowitz I and II, Sanitation Men* and *Gardner,* the Court was confronted with several New York statutes that permitted dismissal of a public employee who refused to testify before various courts, committees, officers or boards on the ground that his or her answers might tend to incriminate him or her and who refused to waive immunity from prosecution resulting from answers he or she might give in that testimony.

dicated on the employee's refusal to waive immunity which is forbidden by *Lefkowitz I* and *II, Sanitation Men* and *Gardner,* not a discharge based on refusal to answer where there is no demand by the employer of the relinquishment of the constitutional right.

Gulden and Sage, on appeal, do not maintain that the Defendants *explicitly* requested they waive immunity. (The waiver forms, notes 2-4 *supra,* clearly show no such requested waiver.) They seem to claim, rather, that *Gardner, Sanitation Men* and *Lefkowitz I* and *II* mandate that once they articulated their fifth amendment concerns,[7] the Defendants were required to make an affirmative tender of immunity[8] before a polygraph exam could be required.[9] The Defendants' subsequent failure to do so, according to the rationale urged here, must have acted as an implicit demand of a waiver of immunity which justified the refusals to take the polygraph exams and made unlawful the subse-

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[7] The Defendants argue that Gulden and Sage were not concerned about their fifth amendment rights and that an affirmative tender of immunity would not have altered their refusals. The trial court agreed. We need not determine whether this finding was clearly erroneous as we hold that, even if Gulden and Sage were concerned with self-incrimination, there had been no compelled waiver of their rights in this regard and full fifth amendment protections were available.

[8] The Defendants do not challenge Gulden's and Sage's implicit assertion that the Defendants had the power to grant immunity, or that their assurances of immunity would have had any force or effect. Any question of this nature is simply not an issue before us.

[9] The Defendants do not offer any distinction between the grand jury testimony sought in *Gardner, Sanitation Men* and *Lefkowitz I* and *II* and the demand that Gulden and Sage submit to a polygraph examination. They assume that the principles of compulsion and immunity as articulated in cases dealing with grand jury testimony apply equally to this case. Thus there is no issue before us relating to any possible distinction.

quent discharges. Gulden and Sage also rely on several circuit court opinions in which there seems to be a requirement upon the employer of an affirmative tender of immunity to an employee. *United States v. Devitt,* 499 F.2d 135, 141 (7th Cir. 1974), *cert. denied,* 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466 (1975) ("Nor may disciplinary action be taken against the witness for his refusal to testify, unless he is first advised that, consistent with the holding in *Garrity,* evidence obtained as a result of his testimony will not be used against him in subsequent criminal proceedings."); *Confederation of Police v. Conlisk,* 489 F.2d 891 (7th Cir. 1973), *cert. denied sub nom, Rochford v. Confederation of Police,* 416 U.S. 956, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) ("[A] public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, *i.e.,* that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings."); *Uniformed Sanitation Men Association v. Commissioner of Sanitation of the City of New York,* 426 F.2d 619 (2nd Cir. 1970), *cert. denied,* 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349 (1972) ("[T]he employee is [to be] duly advised of his options and the consequences of his choice.").

[4] Gulden's and Sage's theory that an affirmative tender of immunity was mandated by the holdings

of *Lefkowitz I* and *II*, *Sanitation Men* and *Gardner* finds no support in those cases.[10] It was rather the explicit demand by the employer of the waiver of immunity on penalty of job loss that created the constitutional infirmity. An employee who is compelled to answer questions (but who is not compelled to waive immunity) is protected by *Garrity* from subsequent use of those answers in a criminal prosecution. It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity. *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York*, 426 F.2d at 627. Logically then, the Defendants' failure to tender immunity has put Gulden and Sage in no more jeopardy than *Gardner*, *Sanitation Men* and *Lefkowitz I* and *II* allow. "Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity." *Lefkowitz II*, 431 U.S. at 806, 97 S.Ct. at 2136; *cf. Hoover v. Knight*, 678 F.2d 578 (5th Cir. 1982) (employee who was involved in parallel administrative and criminal proceedings did not have right to postponement of administrative proceedings in which she had not been forced, on threat of job termination, to waive fifth amendment protection in parallel criminal pro-

[10] While Justice Stevens, in dissent in *Lefkowitz II*, referred to a "tender of immunity," such a requirement has never been an explicit or implicit condition of the relevant holdings.

ceedings). There was no requirement of surrender here. Failure to tender immunity was simply not the equivalent of an impermissible compelled waiver of immunity.

Moreover, the circuit court cases cited by Gulden and Sage do not stand for the proposition urged by them that an affirmative tender of immunity must be given prior to an employee's appearance at a polygraph exam. A review of the facts of the cases relied upon indicate that the reviewing courts were concerned about the failure to tender immunity *at the time of a grand jury appearance* (*Devitt*) or at *an interdepartmental interrogation* (*Conlisk*). Had Gulden or Sage responded to the request to appear for the polygraph exam and been faced with questions which they, for reasons of self-incrimination, refused to answer, their refusals to answer, absent some assurance that their compelled answers could not be used against them, would be supported by the holdings of these circuit decisions. We, however, decline to answer the highly speculative question whether an affirmative grant of immunity might, *at some point,* be necessary under controlling Supreme Court authority. The facts before us do not indicate even the existence of a particularized, specific inquiry in which questions of immunity could be properly

framed."[11] We further decline to promulgate the rule, urged upon us by Gulden and Sage, that would allow an employee, before he or she is required to respond to any questions, to circumvent an investigatory proceeding by claiming generalized fifth amendment concerns prior to the time those concerns have been developed in a particularized context.

In conclusion, the discharges imposed upon Gulden and Sage were not imposed because they refused to waive their fifth amendment rights to be free from self-incrimination. No explicit or implicit waiver of their right to immunity had been requested of them. Any answers given by them could not, under *Garrity,* be used against them. Moreover, because the inquiry had not advanced to a level of specificity in which the competing concerns of immunity could be properly addressed, no affirmative duty (if any such duty may ever be found)

---

[11] For example, in this case, possible criminal prosecution relating to a bomb threat could be initiated on the federal or state level and any grants of immunity would call into question the specific statutory requirements of federal and Texas immunity statutes. *See* 18 U.S.C. §§ 6002, 6003 (federal immunity statutes); Note, Texas Immunity Law: A Survey and a Proposal, 10 Univ. of Hou.L.Rev. 1120 (1973). We, of course, recognize that there need not exist a specific statute setting forth a grant of immunity in order for one giving compelled testimony to be protected from its use in criminal prosecution. *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of The City of New York,* 426 F.2d 619, 626 (2nd Cir. 1970) ("[W]e see no reason why there must be a statute conferring [immunity]. There was non in *Garrity,* but the very act of the attorney general in telling the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity."). We note only that, in any case where the narrow question is whether there devolves upon an employer an affirmative obligation to provide immunity, it may seem most consistent with the statutory and non-statutory concerns of immunity to require that immunity must be tendered in the context of a particular proceeding after proper invocation of the fifth amendment. In that case, the questions relating to who can grant immunity and under what circumstances could properly be addressed.

had devolved upon the employer to advise Gulden and Sage that immunity was available. Gulden and Sage were told only that they must take the polygraph exams to retain employment. This was a permissible requirement.

III. Propriety of Questions Asked

[5, 6] The trial court found that the polygraph questions related only to the August 14, 1978 bomb threat,[13] and were permissible. That finding is supported by the record. The question to ask in determining whether such polygraph questions are permissible is whether those questions were specifically, directly and narrowly related to the performance of the employee's public duties. *Gardner v. Broderick,* 392 U.S. at 278, 88 S.Ct. at 1916. To the extent that the *Gardner* holding relating to questions to be asked an employee by a grand jury compels that only certain types of questions be asked on a polygraph exam, we do not believe that the trial court erred in determining that the polygraph questions here were related to the performance of Gulden's and Sage's official duties. As the district court found:

> The bomb threat seriously disrupted the operations of the property management division because it appeared to be intended as an attempt to harass the retiring director of the property management division and because the bomb threat was perceived as one in a series of

[13] Gulden and Sage contended that they did not know, in the beginning, the nature of the questions. They have abandoned this contention on appeal.

harassing pranks directed toward employees, especially supervisors, of the property management division. Those pranks, according to the testimony of Defendant McCorkle and Dickerson, had adversely affected morale and had reduced productivity in the property management division.

Questions of an employee relating to whether that employee might have telephoned a bomb threat to his or her employer's location during working hours clearly relate to the performance of official duties.

AFFIRMED.

APPENDIX B

Charles A. GULDEN and Richard R. Sage, Plaintiffs-Appellants

v.

Monroe McCORKLE and George Dickerson, Defendants-Appellees.

No. 81-1518.

United States Court of Appeals,
Fifth Circuit

Sept. 10, 1982.

Appeal from the United States District Court for the Northern District of Texas: Robert W. Porter, Judge.

Kenneth H. Molberg, Dallas, Tex., for plaintiffs-appellants.

Lee E. Holt, City Atty., Joseph G. Werner, Asst. City Atty., Dallas, Tex., for defendants-appellees.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 21, 1982, 5 Cir., 1982, 680 F.2d 1070).

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No

member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for rehearing en banc is DENIED.

The appellants' suggestion for rehearing en banc suggests that the appellants have misunderstood the opinion rendered in this case. That opinion does *not* answer the question whether, when a public employee is asked a potentially incriminating question, there must be an affirmative grant of immunity. That question is specifically reserved. Reference is made to the penultimate paragraph under Part II of the opinion, which begins "Moreover . . .," and particularly to the part of that paragraph read-as follows:

> Had Gulden or Sage responded to the request to appear for the polygraph exam and been faced with questions which they, for reasons of self-incrimination, refused to answer, their refusals to answer, absent some assurance that their compelled answer could not be used against them would be supported by the holdings of these circuit decisions. We, however, decline to answer the highly speculative question whether an affirmative grant of immunity might, *at some point,* be necessary under controlling Supreme Court authority. The facts before us do not indicate even the existence of a particularized, specific inquiry in which questions of immunity could be properly framed." We further decline to promulgate the rule,

urged upon us by Gulden and Sage, that would allow an employee, before he or she is required to respond to any questions, to circumvent an investigatory proceeding by claiming generalized fifth amendment concerns prior to the time those concerns have been developed in a particularized context.

Reference is also made to the following portion of the last paragraph under Part II:

Moreover, because the inquiry had not advanced to a level of specificity in which the competing concerns of immunity could be properly addressed, no affirmative duty (if any such duty may ever be found) had devolved upon the employer to advise Gulden and Sage that immunity was available. Gulden and Sage were told only that they must take the polygraph exams to retain employment. This was a permissible requirement.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CHARLES A. GULDEN AND
RICHARD R. SAGE

vs. No. CA3-78-1043-F

MONROE MCCORKLE, GEORGE DICKERSON AND THE CITY OF DALLAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs in the above styled and numbered cause have claimed that they were discharged and otherwise discriminated against by the Defendants for exercising their right to refuse to take polygraph examinations or to answer questions. Plaintiffs also claim that they have been subjected to discrimination in the terms and conditions of their employment because of their attempts to petition for redress of grievances and that the Defendants have failed or refused to protect them from violations of their civil rights. Plaintiffs assert that the actions of the Defendants constituted violations of 42 U.S.C. §§ 1983, 1985 and 1986. The Defendants have denied that they discharged or otherwise discriminated against the Plaintiffs in the conditions of their employment, have denied that they failed or refused to protect plaintiffs from violations of their constitutional rights and have denied plaintiffs had any federally protected right to refuse to answer questions specifically, directly and narrowly

relating to the performance of their official duties and that Plaintiffs were not required to waive their immunity with respect to the use of their answers or the fruits thereof in a criminal prosecution. This action came on for trial before the Court; and based on the evidence adduced by the parties, the Court makes its findings of fact and conclusions of law as set forth below.

FINDINGS OF FACT

1. Plaintiffs Charles A. Gulden and Richard R. Sage were at the times material hereto employes of the City of Dallas, Department of Public Works, Property Management Division.

2. At all times material hereto, Defendant Monroe McCorkle was the Director of Public Works of the City of Dallas. Defendant George Dickerson was the Assistant Director of Public Works.

3. The City of Dallas is a home rule municipal corporation established under the laws of the State of Texas.

4. At the time of the incident in question, both plaintiffs were employed as Right of Way Agents, whose duties entailed negotiating the acquisition of property for use by the City.

5. On or about August 14, 1978, between two and three p.m., a bomb threat was made to the Dallas City Employees Credit Union at 1500 West Mockingbird Lane, in Dallas, Texas.

6. The city facility containing the credit union houses a number of city departments with numerous employees. The credit union is not a part of the Public Works Department but is located at the opposite end of the facility.

7. Earlier that day, around lunchtime, a man had called the Lemmon Avenue branch of the credit union and had informed personnel there that an employee of the Mockingbird branch had been the subject of a robbery.

8. The bomb threat forced the evacuation of the Mockingbird facility for some thirty minutes, and also caused a delay in the retirement party for Bruce Hunter, who was retiring from the Public Works Department. This retirement party was to be held in the cafeteria of the complex. Invitations to the party were not confined to employees of the Public Works Department but went to several departments and employees.

9. On approximately August 17, 1978, some three days after the bomb threat, Monroe McCorkle, Director of Public Works, through his Assistant Director, George Dickerson, presented a memorandum to each Property Management Division employee that directed him or her to submit to a polygraph examination and so sign a "waiver" in connection therewith.

10. Upon being presented with the "waiver," both

Gulden and Sage refused to sign. The waiver read as follows:

> I, ... of sound mind and body, age ....., do hereby submit to a polygraph examination given by ....., a certified polygraph examiner in the State of Texas. I understand that I have been ordered to take a polygraph examination by the Director of Public Works in conducting an administrative investigation for possible City of Dallas Code of Conduct violations. I hereby give my consent to ..... to conduct this polygraph examination concerning the subject matter previously discussed.

11. The private firm administering the polygraph examination required a different waiver, which employees who took the test also had to sign. The pertinent portion of that document provided:

> I, ..., hereby consent and voluntar ily agree to allow Baker-Holden-McElroy & Associates to administer a polygraph (lie detection) examination to me. I voluntarily consent to this examination of my own free will, and state that no duress, threats, or coercion have been placed on me to take this examination. I have not been promised anything of value, reward, or immunity to induce me to consent to this examination. I understand that I have the right to stop my polygraph examination at any time I desire.

12. When Plaintiffs refused to sign the waiver and consent forms, and then submit to the exam, they were both placed on administrative leave.

13. Following the bomb threat and at the time Plaintiffs were requested to submit to the polygraph examinations, there was an ongoing police investigation.

14. There were others besides Plaintiffs who had refused to submit to the polygraphs. All of these, except two, were also placed on administrative leave.

15. After Plaintiffs had been placed on administrative leave, they were directed to go to the police department to take a polygraph examination. Employees who took the police department examination were required to sign one of the two waivers or consents. Plaintiffs refused to take the police department polygraphs.

16. Both Plaintiffs were discharged on Tuesday, August 29, 1978, by letter from Monroe McCorkle, for refusing to follow orders.

17. Plaintiff Sage was reinstated to his employment by the City of Dallas Civil Service Trial Board, on February 12, 1979, and the penalty of discharge was modified to a 30-day suspension.

18. Plaintiff Gulden's discharge was upheld by the trial board on February 23, 1979.

19. The memorandum, dated August 16, 1978, from Monroe McCorkle, which directed Plaintiffs to submit to a polygraph examination stated that employees were directed to submit to an examination to "determine whether or not you have any knowledge concerning the bomb threat on Monday, August 14, 1978 at 1500 W. Mockingbird" and that "the questions will concern only your knowledge of the 'bomb threat' and no other subject." The Plaintiffs refused to submit to a polygraph examination and thus were asked no questions at all. The questions asked those who did submit to the polygraph examination consisted only of the examiners 'control' questions and questions relating directly to the bomb threat. There was no evidence that the polygraph examiners asked any questions not related to the bomb threat, and there was no evidence that the Defendants sought to have the examiners ask any questions not related to the bomb threat.

20. Questions relating to the bomb threat were job-related. The bomb threat seriously disrupted the operations of the property management division because it appeared to be intended as an attempt to harass the retiring director of the property management division and because the bomb threat was perceived

as one in a series of harassing pranks directed toward employees, especially supervisors, of the property management division. Those pranks, according to the testimony of Defendant McCorkle and Dickerson, had adversely affected morale and had reduced productivity in the property management division.

20. The employees in the property management division were singled out for the polygraph exam because of the pranks that had occurred in the past.

21. There was no evidence that the Defendants demanded that Plaintiffs expressly waive their rights to invoke the Fifth Amendment's right to be free from self-incrimination and thereby relinquish the right to exclude from evidence in any subsequent criminal proceeding any statements which they might have made during the polygraph examination. There is no state statute, city ordinance or city personnel rule that purports to create any such waiver.

22. The evidence shows that neither Gulden nor Sage ever expressed any concern that by taking the polygraph examination and signing the required waivers that he might be waiving his right against self-incrimination or that he might be providing testimony which could be used to prosecute him criminally. Advising the Plaintiffs that their statements would be

inadmissible in any criminal prosecutions would not have overcome any of the expressed objections to the polygraph exams, and they would not have submitted to the polygraphs even had they been so advised.

23. The acts of the Defendants did not condition Plaintiffs' continued employment upon the relinquishment of their right to exclude their own testimony from evidence in a criminal proceeding and did not in any way deprive the Plaintiffs of their Fifth Amendment privilege against self-incrimination.

24. Neither Gulden nor Sage was discharged because of his attempts to petition for redress of grievances.

25. The Defendants did not discriminate against either Gulden or Sage in wages, hours or conditions of employment because of any attempt to petition for redress of grievances.

26. Plaintiffs were discharged because of their refusal to answer questions specifically, directly and narrowly relating to the performance of their duties.

27. Any finding of fact that is also a conclusion of law is hereby adopted as such.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and over the subject matter, and venue is proper in this district.

2. The starting point in the Court's analysis of this case is *Garrity v. New Jersey,* 385 U.S. 493 (1967), where the Supreme Court held that testimony compelled by the threat of dismissal from employment could not be used in a criminal prosecution of the witness. The principles enunciated in *Garrity* were further defined in *Gardner v. Broderick,* 392 U.S. 273 (1968) and its companion case, *Uniformed Sanitation Men Ass'n v. Comm'r,* 392 U.S. 280 (1968). In those cases the Court was confronted with the situation in which public employees had been dismissed from their employment because they had refused to expressly waive their Fifth Amendment privilege against self-incrimination. The Court found that these employees had been dismissed from office, not for failure to answer relevant questions about their official duties but because of their refusal to waive a constitutional right. The Court went on to hold, however, that if an employee had refused "to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal

prosecution of himself, . . . the privilege against self-incrimination would not [be] a bar to . . . dismissal." *Gardner,* 392 U.S. at 278.

In the case at bar, the questions asked on the polygraph exam were purely job-related. Moreover, the waivers at issue can in no way be construed as requiring Plaintiffs to relinquish their constitutional right against self-incrimination. The waivers speak merely to the fact that the examinee has consented to take the exam. The Public Works Department waiver specifically recites that the examinee is being ordered to take the examination, and the waiver required by the firm conducting the polygraph specifically gives an examinee the right to discontinue the exam at any time. Unlike in *Gardner* and *Uniformed Sanitation Men Ass'n,* the evidence in the instant case shows clearly that the Defendants were not seeking "testimony from [the Plaintiffs] own lips, which despite the constitutional prohibition, could be used to prosecute them criminally," but were merely attempting to elicit an "accounting of their use or abuse of the public trust." *Gardner,* 392 U.S. at 285.

The Fifth Amendment does not require that an employee be advised that evidence obtained as a result of his testimony will not be used against him. It requires only that an em-

ployee be advised if it *will* be used against him, and further that an employee may not be dismissed for refusing to waive his right against self-incrimination. Had the Plaintiffs in this action submitted to the polygraph, and had there been an attempt to use that testimony against them in a criminal proceeding, Plaintiffs' constitutional rights would have been adequately protected by holding in *Garrity, supra,* that testimony compelled by the threat of dismissal may not be used against them in a subsequent criminal action.

3. Plaintiffs have failed to provide by a preponderance of the evidence that Defendants in any way violated Plaintiffs' constitutional rights.

4. Plaintiffs were discharged for failing to answer questions specifically, directly and narrowly relating to the performance of their public duties, when they were not required to waive any of their constitutional rights.

5. Defendants did not discriminate against Plaintiffs in the terms and conditions of their employment.

6. Defendants did not fail or refuse to protect Plaintiffs from violations of their civil rights.

7. Any conclusion of law that is also a finding of fact is hereby adopted as such.

Accordingly, Plaintiffs having failed to prove that their dismissals were unconstitutional, they

are entitled to no relief, and judgment shall be entered in favor of Defendants.

Signed and entered this 25th day of August, 1981.

/s/ ROBERT W. PORTER
United States District Judge

82-1012

Supreme Court, U.S.
FILED
JAN 7 1983
ALEXANDER L. STEVAS
CLERK

NO. 80-1012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES A. GULDEN AND
RICHARD R. SAGE,

Petitioners,

VS.

MONROE McCORKLE,
GEORGE DICKERSON AND
THE CITY OF DALLAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

	Page
LIST OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Proceedings in the District Court and the Court ofAppeals	1
Statement of Facts	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9

LIST OF AUTHORITIES

	Page
Arlington Heights v. Metropolitan Housing Corporation, 429 U.S. 252 (1977)	8
Carey v. Piphus, 435 U.S. 247 (1978)	8
Gardner v. Broderick, 392 U.S. 273 (1968)	4
Garrity v. New Jersey, 385 U.S. 493 (1967)	5
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)	8
Uniformed Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968)	4

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RESPONDENTS' BRIEF

TO THE HONORABLE JUSTICES OF SAID COURT:

Monroe McCorkle, George Dickerson and the City of Dallas, the Respondents, respectfully submit the following brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Proceedings in the District Court and the Court of Appeals

This is a civil rights case in which public employees contend that they were deprived of their Fifth Amendment

right against self-incrimination because they were discharged for refusing to answer questions in a polygraph examination. The employees claim that their supervisors attempted to extract a waiver of the employees' right against self-incrimination, failed to warn them that their testimony would be inadmissible in criminal proceedings, and sought to ask them questions which were not job-related.

The district court found that the employees were not advised that their answers could not be used in criminal proceedings, but found that the employees would not have submitted to the polygraph examination even if they had been warned (Record, Vol. I at 85, paragraph 22). The district court found that no waiver was required by the City (Record, Vol. I at 85, paragraph 21) and that the City's inquiry was job-related (Record, Vol. I at 84, paragraph 20). The district court concluded that the employees were not deprived of their right against self-incrimination (Record, Vol. I at 86-87), rendered judgment for the City (Record, Vol. I at 89), and the employees appealed. The Court of Appeals for the Fifth Circuit affirmed, 680 F.2d 1070, rehearing denied, 685 F.2d 157.

STATEMENT OF FACTS

Petitioners, Gulden and Sage, were employees of the Property Management Division of the Public Works Department of the City of Dallas. Respondents McCorkle and Dickerson were the Director and Assistant Director of the Public Works Department.

Supervisors within the Property Management Division had been subjected to a series of harassing pranks by a person or persons who apparently had knowledge of the personnel and operations of the Property Management Division (Record, Vol. I at 84, paragraph 20; Vol. II at 19,

20, 23, 55, 56, 57, 63, 68). When the head of the Property Management Division retired, he was honored at a celebration in the cafeteria of the building occupied by the Property Management Division and other city offices (Record, Vol. I at 82; Vol. II at 25). Shortly before that retirement party was to begin, another city office in the building received a telephoned bomb threat (Record, Vol. I at 82; Vol. II at 12, 13). That bomb threat forced the evacuation of the entire building, and disrupted the retirement party (Record, Vol. I at 82; Vol. II at 13, 53, 54).

McCorkle and Dickerson viewed the bomb threat as another prank directed at Property Management Division supervisors (Record, Vol. I at 84; Vol. II at 20, 25), and by written memorandum directed all Property Management Division employees to take a polygraph examination to "determine whether or not you have any knowledge concerning the bomb threat" (Record, Vol. I at 82-3, 84; Vol. II at 53, 149, 150, 199). The memorandum expressly stated that the polygraph questions would "concern only your knowledge of the bomb threat and no other subject" (Record, Vol. I at 84; Vol. II at 53, 149, 150, 199). Gulden and Sage refused to submit to the polygraph examination and, therefore, were asked no questions (Record, Vol. I at 83). Those employees who did submit to the examination where asked only the examiners' "control" questions and questions relating directly to the bomb threat (Record, Vol. I at 84; Vol. II at 199). There was no evidence that the polygraph examiners asked any questions not related to the bomb threat (Record, Vol. II at 197-199), and there was no evidence that the Petitioners sought to have the examiners ask any questions not related to the bomb threat (Record, Vol. I at 84). Gulden and Sage were fired because they refused to submit to the polygraph examination (Record, Vol. I at 84).

SUMMARY OF ARGUMENT

The employees would not have taken the polygraph examination even if they had been given an appropriate warning and, therefore, the failure to give such a warning could not have been a proximate cause of any injury to the employees.

The district court's finding, that the employees were not required to waive their self-incrimination privilege, is not challenged as clearly erroneous, is not clearly erroneous, and should not be disregardeed.

The district court's finding, that the polygraph questions were job-related, is supported by the evidence and is not clearly erroneous.

ARGUMENT

The dismissal of public employees for refusing to submit to a polygraph examination does not violate the Fifth Amendment privilege against self-incrimination where the employer requires only that employees answer questions specifically, directly, and narrowly relating to the performance of their official duties without requiring relinquishment of the benefits of the constitutional privilege. *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968).

This Court has neither held nor intimated that a public employee has a right to keep his job after refusing to testify about job-related matters. The Court, instead, has held only that a public employee cannot be dismissed for refusing "to execute a document purporting to waive his constitutional rights and to permit prosecution of himself on the basis of his compelled testimony." *Gardner v. Broderick*, 392 U.S. 273,

279 (1968). It is compelled testimony in combination with a compelled waiver of immunity which violates the constitutional privilege, and the Court has found constitutional violations only where express waivers were demanded. See *Gardner v. Broderick*, 392 U.S. 273, 274 (1968), *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280, 282-3 (1968), *Lefkowitz v. Turley*, 414 U.S. 70, 76 (1973) and *Lefkowitz v. Cunningham*, 431 U.S. 801, 802 (1977). If no waiver is demanded, the employee is protected against use of his own testimony, *Garrity v. New Jersey*, 385 U.S. 493 (1967), and the purpose of the privilege is fully served.

The Polygraph Examination Was Job-Related

The memoranda which directed Gulden and Sage to submit to a polygraph examination stated that employees were directed to submit to an examination "to determine whether or not you have any knowledge concerning the bomb threat on Monday, August 14, 1978 at 1500 West Mockingbird" and that "the questions will concern only your knowledge of the 'bomb threat' and no other subject." (See Plaintiffs' Exhibits 4, 8, 12, 17, 23). Gulden and Sage refused to submit to a polygraph examination and, of course, were asked no questions, job-related or otherwise. The questions asked those employees who did submit to the polygraph examination consisted only of the examiners' "control" questions and questions relating to the bomb threat (See Defendants' Exhibits 3, 4, 14, 15).

There is no evidence that the polygraph examiners asked any questions unrelated to the bomb threat, and there is no evidence that McCorkle and Dickerson sought to have the examiners ask any questions not related to the bomb threat.

Questions concerning the bomb threat were job-related because the person who made the bomb threat seriously disrupted the operations of the Property Management Division, because the bomb threat appeared to be intended as an attempt to harass the retiring director of the Property Management Division, and because the bomb threat was perceived as one in a series of harassing pranks directed toward employees, especially supervisors, of the Property Management Division. Those pranks, according to the testimony of McCorkle and Dickerson had adversely affected morale and had reduced productivity in the Property Management Division (Record, Vol. II at 19, 20, 23, 57, 63, 68).

Waiver of the Privilege

There was no contention in the district court, and no evidence, that McCorkle and Dickerson demanded that Golden and Sage waive their right to invoke the self-incrimination privilege and thereby relinquish the right to exclude from evidence in a criminal trial any statements which they might make during the polygraph examination. There is no state statute, city ordinance or city personnel rule which purports to create any such waiver.

The "Advice" Requirement

Sage did not refuse to submit to a polygraph examination because of any concern that he might provide testimony which could be used to prosecute him criminally; instead, he refused to submit to the polygraph examination because "I was not notified when I accepted employment with the City of Dallas that I would be required to take polygraph tests as a condition of my employment" (Plaintiffs' Exhibit 10), because the demand for the polygraph examination

"smacks of selective discrimination" (Plaintiffs' Exhibit 10), because "no other divisions within the City of Dallas are being required to take this polygraph" (Plaintiffs' Exhibit 10), because "I have not been charged with any City of Dallas Code of Conduct violation and therefore I see no reason to submit to a polygraph examination" (Plaintiffs' Exhibit 10), and because "I would not take the polygraph under any circumstances because I don't believe in them" (Plaintiffs' Exhibit 29, Volume III, page 47). Sage described in writing his reasons for refusing to submit to a polygraph examination, and his written refusal (Plaintiffs' Exhibit 10) contains no mention of any concern that he might be waiving his right against self-incrimination or that he might be providing testimony which could be used to prosecute him criminally. The district court found that advising Sage that his statements would be inadmissible in a criminal prosecution would not have overcome any of his objections to the polygraph examination, and he would not have submitted to the examination even if he had been so advised (Record, Vol. I at 85, paragraph 22; Vol. II at 92, 152).

Gulden did not refuse to submit to a polygraph examination because of any concern that he might provide testimony which could be used to prosecute him criminally; instead, he refused to submit to the polygraph examination because "I feel that this is not within your rights as defined in my employment contract with the City" (Plaintiffs' Exhibit 9), because "inasmuch as I have previously, in writing and verbally, requested a lie detector test on other matters concerning violations of city rules and civil rights, this same principle will adhere to this situation" (Plaintiffs' Exhibit 9), and because "it has been made public that you personally have animosity toward individuals within the small group directed to submit to this polygraph test"

(Plaintiffs' Exhibit 9). Gulden described in writing his reasons for refusing to submit to a polygraph examination, and his written refusal (Plaintiffs' Exhibit 9) contained no mention of any concern that he might be waiving his right against self-incrimination or that he might be providing testimony which could be used to prosecute him criminally. The district court found that advising Gulden that his statements would be inadmissible in a criminal prosecution would not have overcome any of his objections to the polygraph examination, and he would not have submitted to the examination even if he had been so advised (Record, Vol. I at 85, paragraph 22).

Although Gulden and Sage now claim that they were deprived of their Fifth Amendment privilege because they were not advised of the inadmissibility of their testimony, such advice would not have altered their decision to refuse the polygraph. Since the giving of that advice would not have changed their decision, they were not harmed by its omission. See *Carey v. Piphus*, 435 U.S. 247, 260 (1978), *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252, 270-271 (1977) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-287 (1977).

CONCLUSION AND PRAYER

Gulden and Sage were never asked to waive their right to invoke the self-incrimination privilege of the Fifth Amendment in a criminal proceeding; the polygraph examination was job-related; advising them that their testimony would be inadmissible against them in subsequent criminal proceedings would have been of no effect. McCorkle and Dickerson, therefore, did not condition Gulden's and Sage's con-

tinued employment upon the relinquishment of their right to exclude their own testimony from evidence in a criminal proceeding, and did not in any way deprive them of their Fifth Amendment privilege against self-incrimination. The petition for writ of certiorari should be denied.

Respectfully submitted,

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670-3510

By .....
Assistant City Attorney

CERTIFICATE OF SERVICE

A copy of the foregoing instrument was served by mail on Kenneth Molberg, attorney for Petitioners, on the 6th day of January, 1983.

.....
JOSEPH G. WERNER